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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-889

LILLIAN V. COUCH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (A. 3-5) [1] is reported at 449 F.2d 141. The district court's findings of fact and conclusions of law (A. 6-12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971. The petition for a writ of certi-

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[1] "A." references are to the record appendix filed by petitioner. Appendices A, B, C, D, and E are bound with this brief.

orari was filed on January 10, 1972, and was granted on April 3, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an internal revenue summons may be employed in a joint investigation of both the taxpayer's civil tax liability and her possible criminal liability for income tax fraud.

2. Whether an internal revenue summons requiring an accountant to produce a client's business and tax records relating to prior taxable years for which returns had already been filed, such records being in the accountant's possession, violates either the client's privilege against self-incrimination or her right to be secure from unreasonable searches and seizures.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourth and Fifth Amendments to the Constitution of the United States and of 26 U.S.C. 7402, 7602, and 7604, are set forth in Appendix A, *infra*.

STATEMENT

On January 7, 1970, the respondents (the United States and Edward F. Jennings, a Special Agent of the Internal Revenue Service) filed a petition (Appendix B, *infra*) in the United States District Court for the Western District of Virginia, asking the court, pursuant to Sections 7402(b) and 7604(a) of the

Internal Revenue Code of 1954, 26 U.S.C. 7402(b) and 7604(a), to enter an order enforcing an internal revenue summons (A. 8). The summons (A. 59-60) had been issued on August 18, 1969, pursuant to 26 U.S.C. 7602, to investigate the tax liability of petitioner for the years 1964, 1965, 1966, 1967, and 1968. It was directed to Harold L. Shaffer and called on him to produce on September 2, 1969:

> All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.

Shaffer was an accountant (although not a CPA) who had acted as petitioner's tax consultant for several years.[2]

An answer (Appendix C, *infra*) was filed on behalf of Shaffer alleging that he no longer possessed any workpapers or other documents described in the summons that were his own property and that all the described documents that were in his possession when the summons was served were the property of petitioner. The answer also alleged that on September 2, 1969, he was unable to furnish the requested documents to Special Agent Jennings because he was no longer in possession of them.

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[2] In her brief, petitioner repeatedly refers to Shaffer as her employee (*e.g.*, Br. 5, 7), but there is nothing in the record to support this characterization. Shaffer described his occupation as "Tax consultant" and his relationship to petitioner as "Only * * * a relationship of preparing her income tax returns in the past" (A. 16).

Petitioner filed a motion to intervene which was granted by the district court (A. 9), and petitioner filed an answer (Appendix D, *infra*) alleging that she was the owner of the records in question, that their delivery to Shaffer was temporary only, and that Shaffer had been directed by her to return the records before Shaffer was served with the summons. The answer further alleged that the Internal Revenue Service investigation was being conducted for the sole purpose of obtaining evidence concerning criminal violations, and it argued that the summons should not be enforced because to do so would abridge petitioner's privilege against self-incrimination and her right to protection from unreasonable search and seizure.

An evidentiary hearing was held by the district court. Revenue Agent Dennis L. Groves of the Audit Division testified that he had found indications of a substantial understatement of gross income by petitioner after examining her books and records in Shaffer's office with Shaffer's permission and that he thereupon recommended that the case be reported to the Intelligence Division, as required by Internal Revenue Service regulations (A. 27, 29-31).

Special Agent Jennings, of the Intelligence Division, testified that he commenced a joint investigation with Agent Groves after the case was received from the Audit Division, and that his own functions included (1) determining the correct tax liability, (2) investigating the possibility of income tax fraud and recommending for or against imposition of fraud

penalties, and (3) making a recommendation on a possible criminal tax violation (A. 34-36, 40-41). He further testified that he had introduced himself to petitioner and had given her a *Miranda* warning, as required by a directive of the Internal Revenue Service (A. 37-38), and that he issued the summons to Shaffer after the latter had refused to let him see the records and had denied him permission either to remove the records or to microfilm them in Shaffer's office (A. 42-44).

Shaffer testified that he had performed tax consulting services for petitioner since 1955 (A. 21). These services consisted of preparing petitioner's tax returns from bank statements, daily reported sales and payroll records, and other records furnished to him by petitioner; these records remained in his possession until the morning of September 2, 1969, when, at petitioner's request, Shaffer delivered the records to her attorney (A. 16, 19, 21-24). Shaffer previously had allowed Agent Groves to examine the records and he testified that he would have allowed Special Agent Jennings to examine them but not to microfilm them or to remove them from his office (A. 17, 20, 45). Shaffer did not prepare workpapers from petitioner's records but at the hearing he stated his willingness to testify before the agents as to his knowledge of the records (A. 19, 25-26).

The district court found, *inter alia*, (1) that Special Agent Jennings was, with Agent Groves, conducting a joint and continuing investigation for the purpose of determining both the correctness of petition-

er's tax returns for the years 1964-1968 and the possibility that those returns were fraudulent, and (2) that it is necessary for Jennings to examine the summoned records and to take the testimony of Shaffer in aid of these purposes (A. 6-9).

The district court's legal conclusions were that the summons was issued as part of an investigation which is being conducted for the purposes of determining the correctness of petitioner's tax returns and the possibility of fraud therein; that the summoned records are necessary, material and relevant to such a determination; that the summons was properly issued and served on Shaffer even though the evidence so obtained may ultimately be used in a criminal prosecution against petitioner, should such prosecution ever be instituted; and that since petitioner was not in possession of the summoned records when the summons was served, and this proceeding involves no search or seizure of records in her possession, petitioner cannot assert either the Fourth Amendment or her privilege against self-incrimination under the Fifth Amendment as a defense to enforcement of the summons (A. 10-12).

The district court ordered the summons enforced (Appendix E, *infra*). Because the records, after service of the summons but before its return time, had been surrendered by Shaffer to petitioner's attorney, the court's order required the latter to produce the summoned records for inspection and copying by the Internal Revenue Service. The court of appeals affirmed *per curiam*, holding that (1) issu-

ance of the summons was proper since the investigation retained "a legitimate civil purpose" and (2) the records passed from the sphere of petitioner's privilege against self-incrimination when she voluntarily relinquished her control over them to her accountant (A. 3-5).

SUMMARY OF ARGUMENT

I

The internal revenue summons here was issued in aid of a joint investigation of petitioner's civil tax liability and of her possible criminal liabilty for income tax fraud. At the time of the issuance of the summons there had been no recommendation for petitioner's prosecution nor any determination that any such recommendation would be forthcoming. Issuance of the summons was therefore within the statutory authority of the Internal Revenue Service. *Donaldson* v. *United States*, 400 U.S. 517.

II

A. The Fifth Amendment privilege against self-incrimination is "a prohibition of the use of physical or moral compulsion to extort communications from [the individual asserting the privilege]." *Holt* v. *United States*, 218 U.S. 245, 252-253. Compulsion upon the person asserting it is an essential element of this privilege. Thus, although this Court held in *Boyd* v. *United States*, 116 U.S. 616, that one may not be compelled to produce written statements in his possession that might tend to incriminate him, the

Court has repeatedly held that the privilege does not bar compulsory production of documents from a third party. *Johnson* v. *United States*, 228 U.S. 457; *Perlman* v. *United States*, 247 U.S. 7; *Burdeau* v. *McDowell*, 256 U.S. 465. It is the compelled production of documents from the person being incriminated, and not the compelled production of documents tending to incriminate their nonpossessory owner or author, that is forbidden by the privilege. Since petitioner did not have possession of the papers covered by the summons, the order enforcing the summons involves no testimonial compulsion upon her and is not violative of her Fifth Amendment privilege.

Retention of tax records by an accountant is not materially different from other situations involving third-party possession of incriminating documents. There is no accountant-client privilege of confidentiality under federal law. *E.g.*, *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864. There is no reason in law or logic why the government should not have compulsory access to non-privileged disclosures made to an accountant, no matter in what form made. Such access does not conflict with the policies or historic purposes of the privilege against self-incrimination. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55. The decisions cited by petitioner do not hold otherwise.

B. The Internal Revenue Service, in issuing the summons here, met the requirements set forth by this Court in *United States* v. *Powell*, 379 U.S. 48, and enforcement of the summons therefore does not

violate petitioner's Fourth Amendment right to be secure from unreasonable searches and seizures. Furthermore, in view of petitioner's purpose in disclosing information to her accountant and his responsibility as preparer of her tax return, petitioner could have had no reasonable expectation of privacy with respect to the information disclosed.

ARGUMENT

I

THE INTERNAL REVENUE SUMMONS HERE WAS PROPERLY ISSUED IN A JOINT INVESTIGATION OF TAXPAYER'S CIVIL TAX LIABILITY AND OF HER POSSIBLE CRIMINAL LIABILITY FOR INCOME TAX FRAUD.

Petitioner contends (Br. 8-11, 17-21) that the investigation here "was a manifestly criminal one" (Br. 17) and that use of a summons in aid of this investigation consequently was outside the scope of the summons provisions of the Code, 26 U.S.C. 7402, 7602, and 7604. However, petitioner's characterization of the investigation is erroneous. The investigation here was a joint investigation of petitioner's civil tax liability and of her possible criminal liability for income tax fraud. Issuance of an internal revenue summons in aid of such an investigation was expressly held to be within the statutory authority of the Internal Revenue Service in *Donaldson* v. *United States*, 400 U.S. 517.

1. The purpose of the investigation or audit initiated by Agent Groves was to determine petitioner's

correct tax liability for the years in question (A. 31, 35). Because his discovery of "[e]xcessive spending over known receipts" (A. 30) indicated a substantial understatement of gross income and therefore the possibility of fraud, he referred petitioner's case to the Intelligence Division as required by Internal Revenue Service regulations (A. 29-31). Contrary to petitioner's assertion (Br. 11, 18-19), Agent Groves had not established the existence of fraud prior to referral (A. 32-33).

After petitioner's case had been referred to the Intelligence Division and to Special Agent Jennings, Agent Groves continued his audit of petitioner's income tax returns (A. 29). Special Agent Jennings and Agent Groves were conducting a joint investigation in which they first had to determine whether the tax liabilities reported on petitioner's tax returns were correct before they could even begin to arrive at a conclusion concerning the possibility of tax fraud (A. 34, 40), and the district court correctly so found (A. 10). The summons was issued in furtherance of that joint investigation (*ibid.*).

Thus the investigation here is precisely the kind contemplated by the Court in *Donaldson*, where it was noted that "the special agent may well conduct his investigation jointly with an agent from the Audit Division" and that "their combined efforts are directed to both civil and criminal infractions * * *." 400 U.S. at 535. Furthermore, as in *Donaldson*, there has been no recommendation in this case for petitioner's prosecution.

2. The statutory aspect of this case, therefore, is governed by *Donaldson*, where this Court held that "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U.S. at 536. The Court explained (*id.* at 533, 535-536):

> Any other holding, of course, would thwart and defeat the appropriate investigatory powers that the Congress has placed in "the Secretary or his delegate." * * *
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> * * * * *
>
> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. * * * To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons, or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus stultify enforcement of federal law. * * *

Accordingly, issuance of the summons here was within the statutory authority of the Internal Revenue Service.

II

AN INTERNAL REVENUE SUMMONS REQUIRING AN ACCOUNTANT TO PRODUCE A CLIENT'S BUSINESS AND TAX RECORDS IN THE ACCOUNTANT'S POSSESSION DOES NOT VIOLATE THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION OR HIS RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. The Summons Enforcement Order Did Not Violate Petitioner's Privilege Against Self-Incrimination.

1. *The Privilege Against Self-Incrimination Does Not Apply to Nonpossessory Interests in Books and Records.*

The order of the district court requires production of those business and tax records of petitioner that were in her accountant's possession at the time the summons was issued.[3] Relying principally on *Boyd* v. *United States*, 116 U.S. 616, petitioner contends (Br. 11-16, 21-23) that this order violates her Fifth Amendment privilege not to "be compelled * * * to be a witness against [herself]."

In *Boyd*, this Court held that the plaintiff-in-error there could not be compelled to produce written statements in his possession that might tend to incrimi-

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[3] He delivered the records to petitioner's attorney on the return date of the summons. This was a violation of the summons (A. 50). Neither constitutional nor other rights can be enlarged by action of this kind, and petitioner does not contend otherwise. See *United States* v. *Zakutansky*, 401 F.2d 68, 72 (C.A. 7), certiorari denied, 393 U.S. 1021; *United States* v. *Lyons*, 442 F.2d 1144 (C.A. 1). The district court properly held that in exercise of its equity powers it could therefore order production from petitioner's attorney on the same basis as from her accountant.

nate him.[4] The critical difference between the present case and *Boyd* is that the person here asserting the privilege against self-incrimination is not in possession of the written statements in question and is not being compelled to produce them. Petitioner would extend *Boyd* to protect her nonpossessory ownership interest. Such an extension of the privilege against self-incrimination is not justifiable in terms of the interests served by the Fifth Amendment and would be contrary to previous decisions of this Court.

In *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55, this Court set forth at length the policies and purposes of the privilege against self-incrimination:

> * * * our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government * * * in its contest with the individual to shoulder the entire load," * * *; our respect for the inviolability of the human personality and of the right

[4] This result was criticized in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U.Cin.L.Rev. 671, 701-703 (1968), where it is argued that the production of documents, as contrasted with oral testimony, ought not to be protected by the privilege against self-incrimination.

> of each individual "to a private enclave where he may lead a private life," * * *.

None of these values is impaired by requiring the production of documents from a third person. The internal revenue summons here does not confront petitioner with the "cruel trilemma of self-accusation, perjury or contempt"; it is not "inquisitorial" in nature and its enforcement, not being directed at petitioner, could not threaten her with "inhumane treatment and abuses"; it represents an effort by the government "to shoulder the entire load" of a tax investigation without making direct recourse to the taxpayer, and it does not intrude into any possessory or psychological "private enclave" maintained by petitioner.

The hallmark of the privilege against self-incrimination is protection of the individual from government compulsion to testify against himself. Compulsion upon the person asserting it is an essential element of the privilege. See, *e.g.*, *Holt* v. *United States*, 218 U.S. 245. Thus in *Johnson* v. *United States*, 228 U.S. 457, this Court held that the books and records of a bankrupt, having passed into the hands of the trustee in bankruptcy, could be introduced in evidence against the bankrupt in a prosecution for concealing money from the trustee. The relevant limitation of the privilege against self-incrimination was there succinctly stated for the Court by Mr. Justice Holmes (*id.* at 458): "A party is privileged from producing the evidence but not from its production."

Since the bankrupt petitioner in *Johnson* had been divested of title to his financial records by force of law, that decision, although broadly rested on the absence of any compulsion against the person asserting the privilege, is technically consistent with petitioner's claim here, which is based on ownership. However, a claim essentially identical to that of petitioner here was squarely rejected in *Perlman* v. *United States*, 247 U.S. 7, 15, where the Court, in permitting the presentation to a grand jury of documents tending to incriminate their non-possessory owner, stated:

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent * * * [and] that the owner of property must be considered as having a constructive possession of it wherever it be and in whosoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. * * * [This contention] is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

Similarly, in *Burdeau* v. *McDowell*, 256 U.S. 465, 476, where the owner of stolen papers sought to prevent their use against him in a criminal prosecution, the Court observed:

> We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that

> such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

The principle that emerges from these cases is that the privilege against self-incrimination does not bar compulsory production of documents from third parties, even if those documents would tend to incriminate their nonpossessory owner. As a commentator has observed, "* * * the privilege can be invoked only to protect one's own books which are in one's own possession and which are self-incriminatory. The guaranty may generally be considered inapplicable without the existence of this trinity of ownership, possession and self-incrimination." Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 Brooklyn L. Rev. 70, 71 (1966). Accordingly, when this Court reaffirmed *Boyd* in *Schmerber* v. *California*, 384 U.S. 757, 764, it did so on the ground that the production of one's own papers in compliance with a subpoena involves "the compulsion of responses which are also communications." The Court held in *Schmerber* that the privilege applies only to a compelled testimonial or communicative response. Since petitioner here did not have possession of the papers covered by the summons, which was in any event directed to a third

party, "[n]ot even a shadow of testimonial compulsion upon or enforced communication[5] by [her] was involved * * *" (*id.* at 765; footnote supplied).

2. *There is No Justification for a Special Exception to Extend the Privilege to a Taxpayer's Nonpossessory Interests in Records Held by Her Accountant.*

Under the general principles just discussed, the privilege against self-incrimination is not available to petitioner here. However, petitioner, in effect, argues that retention of tax records by an accountant is somehow different from other situations involving third-party possession of incriminating documents and that the privilege should be uniquely available to taxpayers in such circumstances. Nothing in these circumstances justifies such a special exception that would extend the privilege far beyond its historic purposes and established bounds.

It is well settled and not here in dispute that no accountant-client privilege of confidentiality exists under federal law and that no such state-created privilege is recognized in purely federal cases. See,

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[5] Petitioner states (Br. 12) that the documents sought by the government were all prepared by her and written by her in longhand. The record does not support this assertion, and it is, in any event, legally irrelevant. This Court early noted that "the mere fact that the appellant himself wrote, or signed, the official letters * * * neither conditioned nor enlarged his privilege." *Wilson* v. *United States*, 221 U.S. 361, 378-379. And see *Schmerber, supra*, 384 U.S. at 764. It is the compelled production of documents from the person being incriminated, and not the compelled production of documents tending to incriminate their author, that is forbidden by the privilege.

e.g., *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864; *Gariepy* v. *United States*, 189 F. 2d 459, 463-464 (C.A. 6); *Himmelfarb* v. *United States*, 175 F. 2d 924, 939 (C.A. 9), certiorari denied, 338 U.S. 860; *Olender* v. *United States*, 210 F. 2d 795, 806 (C.A. 9).[6] Consequently, a taxpayer may assert no privilege of confidentiality in order to deny to the government either the testimony or the workpapers of the taxpayer's accountant. See, *e.g.*, *Sale* v. *United States*, 228 F. 2d 682 (C.A. 8); *Falsone* v. *United States*, *supra*. The privilege against self-incrimination is similarly unavailable to a taxpayer to prevent such disclosure. Cf. *Hale* v. *Henkel*, 201 U.S. 43, 69-70.

Since the government thus may have compulsory access to an accountant's testimony and workpapers, regardless of any privilege his client might assert,

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[6] This result is deeply rooted in Anglo-American legal tradition: "For more than three centuries it has now been recognized as a fundamental maxim that the public * * * has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." VIII Wigmore, Evidence § 2192 (McNaughton Rev., 1961). And a recent commentator specifically pointed out that recognition of a general accountant-client privilege might seriously hamper the government's ability to gather evidence in tax cases and therefore would not be justified in the area of federal tax investigations. Cohen, *Accountants' Workpapers in Federal Tax Investigations*, 21 Tax L. Rev. 183, 210-216 (1966).

it would be anomalous to reach the opposite result with respect to other information in the accountant's possession, merely because the taxpayer happens to own the paper on which the information is written. The form in which petitioner undertook to give the accountant the information and data he required presumably was of no significance to her. If she had communicated by word of mouth, the accountant's testimony and notes revealing what she said would be available in response to a summons. If petitioner had written to her accountant, setting forth information concerning income, expenses, and other matters relevant to the preparation of her tax returns, her letter would similarly be available, since the accountant would have acquired title upon receipt. Furthermore, if petitioner's accountant had followed the common practice of preparing workpapers setting forth in relevant detail the information contained in the books, records, bank statements, and other materials the government seeks here, those workpapers would be subject to summons. And if the accountant had supplemented his workpapers by making photocopies of some or all of his client's original records, the accountant would own the photocopies and they too would not be subject to any claim of privilege by his client.

In short, once there has been a non-privileged disclosure of the information to the accountant (no less than to any other third person), the form in which that information is recorded has no relevance in law or logic to the client's Fifth Amendment privilege.

It is no part of the purpose of that constitutional provision to put a premium on the incompleteness of the accountant's memory or of his own records, or to protect a person from evidence that he may have created. Mere title to the records in the client, without possession, is not significant for, as Mr. Justice Holmes said in *Johnson* v. *United States*, *supra* (p. 14), the client "* * * is privileged from producing the evidence but not from its production." [7]

Nor do the decisions cited by petitioner provide support for the creation of a special taxpayer privilege against production of documents held by the tax preparer. In *Stuart* v. *United States*, 416 F. 2d 459 (C.A. 5), revenue agents had initially induced the taxpayer to part with possession of her records, and the court for that reason refused to enforce a subsequent summons against the accountant to whom the records were delivered. In *Hinchcliff* v. *Clarke*, 371 F. 2d 697 (C.A. 6) (cited by petitioner as *United*

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[7] Petitioner contends (Br. 21-22) that it is unfair to enact a tax law so complex as to require ordinary taxpayers to seek professional assistance without also extending a privilege to the documents transferred to the professional in connection with preparation of the return. But precisely the same kind of claim of legal and business necessity would be equally applicable to the transfer of records to the trustee in bankruptcy in *Johnson* v. *United States*, *supra*, and to numerous other situations. The Fifth Amendment imposes no such obstacle to the ascertainment of truth in complex situations in which disclosure of information to a third person has in some sense been a necessity. The privilege protects petitioner only against being compelled herself to give testimony. Cf. *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62.

States v. *Graf*), the court, in ordering enforcement of a summons, noted that the question presented here was not in issue, for the principal taxpayer there was deceased and the government had expressly disclaimed any intention of bringing a criminal prosecution. The cases in which a taxpayer's claim was honored involved mere custodial safekeeping of records, rather than disclosure of the information they contain to a third person. *Schwimmer* v. *United States*, 232 F. 2d 855 (C.A. 8) (records left in warehouse); *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 6) (records kept in safe on another's premises with taxpayer retaining keys to the safe). These decisions do not suggest that records left with an accountant for his use in preparing tax returns[*] are immune from process. And, as explained above, the Fifth Amendment privilege against self-incrimination provides no basis for such immunity.

B. The Summons Enforcement Order Did Not Violate Petitioner's Right to be Secure Against Unreasonable Searches and Seizures.

Petitioner claims (Br. 12-16) that enforcement of the summons would violate her Fourth Amendment right to be secure from unreasonable searches and seizures. However, this claim is not further articulated and does not appear to be independent of her

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[*] Because the records sought by the government in this case relate to prior taxable years for which returns have long been filed, there is no need to decide whether the government could use an internal revenue summons to reach tax records while the accountant was preparing timely returns therefrom. In our view, however, there is no constitutional obstacle to such use of a summons.

Fifth Amendment argument.[9] In any event, the required production of documents here does not constitute an unreasonable search or seizure. In *United States* v. *Powell*, 379 U.S. 48, this Court pointed out that an internal revenue summons is analogous to other instances of administrative subpoena power, which in turn are comparable to the investigative function of a grand jury or of a court in issuing pretrial discovery orders (*id.* at 57).[10] Accordingly, the Court specified the standards the Internal Revenue Service must meet to obtain judicial enforcement of a summons as follows (*id.* at 57-58):

> * * * the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons * * *. He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *. * * * [A] court may not permit its process to be abused. Such an abuse would take place if the summons

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[9] Petitioner states only that the Fourth Amendment "prevents the government from abusing process so as to conduct an illegal search or seizure to gain testimony or evidence protected by the right of a citizen to be free of self-incrimination" (Br. 12; italics deleted).

[10] Production of the documents specified in a summons, of course, does not involve intrusion into private or business premises by a law enforcement officer to conduct a search during the course of which items other than those specified as the object of the search may be seen.

> had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer * * *.

Petitioner here does not allege that the government failed to meet the *Powell* standard,[11] nor has she made any showing of an abuse of the district court's process. The investigation here was unquestionably conducted pursuant to a legitimate purpose—the ascertainment of petitioner's correct taxable income, including the determination whether there was a basis for additional liability[12] and a possible recommendation for prosecution because of tax fraud. Petitioner's records are necessary, material and relevant to that purpose (A. 10). Furthermore, the summons was not overly broad or indefinite, but was stated with sufficient specificity to enable petitioner's accountant to identify the records sought.[13] See *Okla-*

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[11] Although the Court in *Powell* was concerned with a corporate taxpayer and did not discuss Fourth Amendment prohibitions directly, it is well established that corporations may assert a right to be secure from unreasonable searches and seizures (*e.g., Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385) and that it is within the constitutional power of Congress to provide for the administrative issuance of summonses or subpoenas under appropriate standards. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501.

[12] Civil fraud penalties are imposed by 26 U.S.C. 6653(b).

[13] This is especially true since the accountant had already permitted inspection of the books and records in question and therefore knew precisely what it was that the government requested to be produced.

homa Press Publishing Co. v. *Walling*, 327 U.S. 186; *McPhaul* v. *United States*, 364 U.S. 372.

While what we have just said suffices to answer petitioner's Fourth Amendment claim, it is also relevant to that claim to point out that petitioner could have no reasonable expectation of privacy with respect to the information disclosed to her accountant for preparation of her tax returns. In furnishing her accountant with business and tax records, petitioner impliedly represented to him that the information truthfully reflected her taxable income, expenses, and other relevant matters. Petitioner necessarily knew that this information would, in appropriate form, be embodied in the tax returns that the accountant would prepare. Having prepared a return, an accountant is required to sign the return, certifying under penalty of perjury that the return is correct to the best of his knowledge and belief. 26 U.S.C. 6065. In doing so, the accountant exposes himself to possible criminal prosecution if he has knowingly aided in the preparation of a false return. See 26 U.S.C. 7206(2); *United States* v. *Kelley*, 105 F. 2d 912 (C.A. 2); *Bateman* v. *United States*, 212 F. 2d 61 (C.A. 9); *United States* v. *Herskovitz*, 209 F. 2d 881 (C.A. 2). Thus, a third person who prepares a tax return also has his own independent interests at stake. If a return he has prepared comes under investigation, certainly he has the need—and he should also have the right—to disclose all the material in his possession on which he has relied, regardless of questions of ownership or title.

Accordingly, petitioner could not reasonably have expected that her records remained within an area of protected privacy or confidentiality. Cf. *Katz* v. *United States*, 389 U.S. 347. She had no reason to suppose that the accountant, having his own independent responsibility under the law, would conceal from the government the justification and explanation of his work. In *Boyd* v. *United States*, *supra*, the Court spoke (116 U.S. at 630) of protecting "the privacies of life." Petitioner's records in the hands of the accountant partake of no such privacies.[14] The fact that the information contained in petitioner's records was published in the form of tax returns, as petitioner expected it to be, reinforces the conclusion that no reasonable expectation of privacy was violated by the order of the district court. That all of the details in the records were not included in the returns was a matter determined not by petitioner but by her accountant, in the course of synthesizing the information for the purpose of the returns. This consideration was noted in *Colton* v. *United States*, 306 F. 2d 633 (C.A. 2), certiorari denied, 371 U.S. 951, in the course of a discussion of the attorney-client privilege, as follows (306 F. 2d at 638):

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[14] Moreover, while we do not contend that the required records doctrine of *Shapiro* v. *United States*, 335 U.S. 1, should, or need, be applied here for Fifth Amendment purposes, it is significant that taxpayers are required by statute to keep records sufficient to disclose their taxable income, deductions, and other such matters (26 U.S.C. 6001). Since the records here involved are in that category, petitioner for this reason as well could not reasonably expect her accountant to withhold them from a tax investigation.

> Not all communications between an attorney and his client are privileged. Particularly in the case of an attorney preparing a tax return * * *, a good deal of information transmitted to an attorney by a client is not intended to be confidential, but rather is given for transmittal by the attorney to others—for example, for inclusion in the tax return. Such information is, of course, not privileged. * * *

Cf. *United States* v. *Tellier*, 255 F. 2d 441, 447 (C.A. 2).[15]

In short, in view of the use to which petitioner voluntarily put the records, and the lack of any privilege of confidentiality between an accountant and his client, there was no reasonable expectation of privacy or concealment. It should not be expected that an accountant, standing toward petitioner in the relationship of an independent contractor, would rely on the records as truthful, subscribe to the resulting returns as correct, incur the potential penalties for preparing a false return, and yet be deprived of the right to disclose to tax investigators the business records upon which he relied.

Finally, contrary to petitioner's contention (Br. 22-23), the enforcement of an internal revenue summons in a case such as this furthers the government's interest in minimizing revenue losses due to underreporting of income. Investigative access to all rele-

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[15] See, also, *United States* v. *Cote*, 456 F.2d 142, 145 (C.A. 8), holding that disclosures on a tax return "waived the privilege [the attorney-client privilege] not only to the transmitted data but also as to the details underlying that information."

vant documents held by a tax preparer increases the speed, completeness and accuracy of tax investigations, and thereby renders the auditing procedure more efficient. In turn, this leads to the recovery of greater revenues and discourages future underreporting. This is of great importance to a revenue system that depends primarily on honest self-reporting by taxpayers.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

KEITH A. JONES,
Assistant to the Solicitor General.

JOHN P. BURKE,
JOHN M. BRANT,
Attorneys.

AUGUST 1972.

APPENDIX A

The Fourth and Fifth Amendments to the Constitution of the United States provide in pertinent part as follows:

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

FIFTH AMENDMENT

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 7402, 7602, and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7402, 7602, and 7604, provide in pertinent part as follows:

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in

equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No.

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

v.

HAROLD L. SHAFFER, RESPONDENT

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

Now comes the United States of America and Special Agent Edward F. Jennings, Internal Revenue Service, by their attorney, Leigh B. Hanes, Jr., United States Attorney for the Western District of Virginia, and respectfully shows unto this Court as follows:

1. This is a proceeding brought under the authority of 26 U.S.C. Sections 7402(b) and 7604(a) (1954), to judicially enforce an Internal Revenue Summons.

2. The petitioner, Edward F. Jennings is a special agent of the Internal Revenue Service, employed in Richmond, Virginia, and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C., Section 7602), and Treasury Regulations, Section 301.7602-1 (26 C.F.R. 301.7602-1).

3. The respondent, Harold L. Shaffer resides at 2233 Cantle Lane, S.W., Roanoke, Virginia.

4. The petitioner, Special Agent Edward F. Jennings has been conducting an investigation to ascer-

tain the correctness of the income tax returns of Lillian V. Aleshire also known as Lillian V. Couch for the taxable years 1964 through and including 1968.

5. Respondent, Harold L. Shaffer is in possession and control of various books, records, papers and information relating to the tax liability of Lillian V. Aleshire, a/k/a Lillian V. Couch for the taxable years 1964 through and including 1968.

6. On August 18, 1969, as part of the investigation described in paragraph 4 above, an Internal Revenue summons was issued by the petitioner, Special Agent Edward F. Jennings, directing the respondent, Harold L. Shaffer, as the custodian of the books, records and documents of the taxpayer Lillian V. Aleshire, a/k/a Lillian V. Couch to appear before Special Agent Edward F. Jennings on September 2, 1969, at 9:30 a.m., at the office of the respondent Harold L. Shaffer at 1524 Peters Creek Road, N. W., Roanoke, Virginia, to testify and to produce certain books, records and papers all as more fully set out in the attached affidavit of Special Agent Edward F. Jennings and the attached summons. An attested copy of the summons was served upon the respondent Harold L. Shaffer, on August 18, 1969, by handing to him at his office at 1524 Peters Creek Road, N. W., Roanoke, Virginia. The summons issued to the respondent, Harold L. Shaffer is attached hereto and incorporated herein as Exhibit A.

7. Due to transportation difficulties on September 2, 1969, the petitioner Special Agent Edward F. Jennings was unable to arrive at the office of the respondent until 10:10 a.m., on the same date.

8. The respondent, Harold L. Shaffer, appeared in front of his office at 10:10 a.m., on September 2,

1969, accompanied by an attorney, but failed and refused to testify and produce the records, papers and documents demanded in response to the summons described in paragraph 7 above and such failure and refusal has continued to the date of this summons.

9. It was and now is essential to the determination of the correctness of the income tax returns of the taxpayer, Lillian V. Aleshire, a/k/a Lillian V. Couch for the taxable years 1964 through and including 1968, that the testimony of the respondent, Harold L. Shaffer as the custodian of the documents, records, books and papers of the taxpayer, Lillian V. Aleshire, a/k/a Lillian V. Couch be taken and that the records, papers and documents demanded be examined as is evidenced by the affidavit of the petitioner, Special Agent Edward F. Jennings, Internal Revenue Service attached hereto as part of this petition.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondent, Harold L. Shaffer, to show cause, if any he has, why he should not comply with and obey the aforementioned summons in each and every requirement thereof.

2. That the Court enter an order directing the respondent, Harold L. Shaffer, to obey the aforementioned summons in each and every requirement thereof by ordering the attendance, and production of the records, papers and documents demanded as is required and called for by the terms of the summons before Special Agent Edward F. Jennings, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Edward F. Jennings, or any other proper officer of the Internal Revenue Service.

3. That the Court enter an order that the respondent, Harold L. Shaffer, appear for the purpose of giving testimony concerning the correctness of the tax returns of Lillian V. Aleshire, a/k/a Lillian V. Couch as to each or any of the fiscal years 1964 through and including 1968, at such time and place as may hereafter be fixed by Special Agent Edward F. Jennings, or any other proper officer of the Internal Revenue Service.

4. That the United States recover its costs in maintaining this action.

5. That the Court render such other and further relief as is just and proper.

LEIGH B. HANES, JR.
United States Attorney

By: .....
Assistant United States
Attorney

EXHIBIT A

Form 2039
(Rev. Nov. 1964)

U. S. Treasury Department—
Internal Revenue Service

SUMMONS

In the matter of the tax liability of

Lillian C. Aleshire, a/k/a Lillian V. Couch
3102 Williamson Rd.
Roanoke, Va.

Internal Revenue District of Richmond
Period(s) 1964-1968 inclusive

THE COMMISSIONER OF INTERNAL REVENUE

To: Harold L. Shaffer
2233 Cantle Lane, S.W.

At: Roanoke, Virginia

GREETINGS:

You are hereby summoned and required to appear before E. F. Jennings, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer.

Place and time for appearance:

At your office, 1524 Peters Creek Road, N.W., Roanoke, Va., on the 2nd day of September, 1969, at 9:30 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 18th day of August, 1969.

ORIGINAL

Signature: E. F. Jennings
Title: Special Agent

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I hereby certify that I served the summons on the reverse hereof

Date Summons Served *(Day, month, year)*	Time
8-18-69	8:47 a.m.

How Summons Was Served *(Check One)*

☒ I handed an attested copy thereof to the person to whom it was directed,

☐ I left an attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed,

Signature	Title
E. F. Jennings	Spec. Agent

Sec. 7603. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No.

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

v.

HAROLD L. SHAFFER, RESPONDENT

AFFIDAVIT

Edward F. Jennings, a petitioner herein, being first duly sworn, deposes and says:

1. That he is a special agent of the Internal Revenue Service with post of duty in Roanoke, Virginia, and performing his duties under the District Director of Internal Revenue, Richmond, Virginia.

2. That in his capacity as special agent, he was assigned to ascertain the correctness of the income tax returns of Lillian V. Aleshire, a/k/a Lillian V. Couch for the years 1964 through and including 1968.

3. That pursuant to such investigation on August 18, 1969, he issued an Internal Revenue summons, directing Harold L. Shaffer, who has custody of the books, papers, records and documents of Lillian V. Aleshire, a/k/a Lillian V. Couch pertaining to the correctness of her tax returns for the years 1964 through and including 1968, to appear before the petitioner, Special Agent Edward F. Jennings, on September 2, 1969, at 9:30 a.m., at the office of the respondent at 1524 Peters Creek Road, N. W., Roanoke, Virginia, and then there to give testimony and produce records described in the attached summons.

4. That on August 19, 1969, he served the summons in person upon Harold L. Shaffer a copy of which is attached as Exhibit A to the petition and made a part hereof.

5. That due to transportation difficulties he was unable to reach the office of Harold L. Shaffer until 10:10 a.m., on the return date of September 2, 1969.

6. That Harold L. Shaffer as the custodian of the books, and records of Lillian V. Aleshire, a/k/a Lillian V. Couch appeared as directed at 10:10 a.m., in front of his office on September 2, 1969, accompanied by an attorney, before the petitioner Special Agent Edward F. Jennings, but refused and failed to testify and produce the records demanded in response to the summons issued to him and such failure and refusal has continued to the date of this affidavit.

7. That the testimony and records demanded by the summons served upon Harold L. Shaffer as custodian of the books and records of Lillian V. Aleshire, a/k/a Lillian V. Couch are necessary to ascertain the correctness of the income tax returns of Lillian V. Aleshire, a/k/a Lillian V. Couch for the years 1964 through and including 1968.

EDWARD F. JENNINGS
Special Agent

Sworn to and subscribed before me this ..... day of ....., 1970.

.....
Notary Public

My commission expires: .....

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No. 70-C-3-R

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

—*vs*—

HAROLD L. SHAFFER, RESPONDENT

ANSWER OF HAROLD L. SHAFFER

FOR ANSWER to the petition filed herein upon which the order to show cause is based in the above entitled cause, Harold L. Shaffer, respondent, says:

I

That the allegations of paragraph one of the petition are denied.

II

That this respondent states that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph two.

III

That the allegations of paragraph three of the petition is admitted.

IV

That the allegation of paragraph four is denied.

V

That the allegation of paragraph five is denied.

VI

That the allegations of paragraph six are denied.

VII

That this respondent states that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph seven.

VIII

That the allegations of paragraph eight are admitted.

IX

That the allegations of paragraph nine are denied.

X

That he does not have nor has he ever had any work papers or other books, records, bank statements, cancelled checks, deposit ticket copies, or other pertinent documents pertaining to the tax liability of Lillian V. Couch as his sole and exclusive property, which were created by his own efforts; and to the extent that he may have owned or created such documents, they were lost, disposed of or destroyed long before service of said summons.

XI

That the bank statements, books, records, cancelled checks, deposit ticket copies, workpapers listed on the summons were in the sole and exclusive property of

Lillian V. Couch and were created by her efforts for her own use.

XII

That the delivery of possession to him of said books, records, cancelled checks, deposit ticket copies and workpapers by Mrs. Couch was temporary only at the will of Lillian V. Couch, and, in fact, as a result of Lillian V. Couch's request, the books, records, cancelled checks, deposit ticket copies and workpapers in question should have been returned to Lillian V. Couch long before service of the summons upon him and that respondent was in fact holding said books, records, cancelled checks, deposit ticket copies and workpapers at the will of Lillian V. Couch.

XIII

That on September 2, 1969, at 9:30 A.M., Harold L. Shaffer, did not have possession of the said books, records, deposit ticket copies, cancelled checks, and workpapers, and, therefore, could not deliver said documents to Special Agent Edward F. Jennings as directed in said summons.

That by reason of all of the above, the respondent, Harold L. Shaffer, has shown cause why he should not be compelled to testify and to produce the records, statements and documents demanded in the Internal Revenue Service Summons served upon him on August 18, 1969.

/s/ Eugene K. Street
EUGENE K. STREET
Counsel for
Harold L. Shaffer

Eugene K. Street
Attorney At Law
216 Shenandoah Building
Roanoke, Virginia 24011

I, Eugene K. Street, Counsel for Harold L. Shaffer, do certify that I have on the 19th day of January, 1970, mailed a true copy of the foregoing answer to James G. Walsh, Esquire, Assistant United States Attorney, Counsel for Petitioner, Federal Building, Roanoke, Virginia.

/s/ Eugene K. Street
EUGENE K. STREET

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civil No. 70-C-3-R

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

—*vs*—

HAROLD L. SHAFFER, RESPONDENT

and

LILLIAN V. COUCH, APPLICANT FOR INTERVENTION

ANSWER OF INTERVENER AS RESPONDENT

FOR ANSWER to the petition filed herein, upon which the order to show cause is based in the above entitled case, Lillian V. Couch, Intervener Respondent, says:

I

That the allegations of paragraph one of the petition are denied.

II

That this respondent states that she has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph two.

III

That the allegation of paragraph three of the petition is admitted.

IV

That the allegation of paragraph four is denied.

V

That the allegation of paragraph five is denied.

VI

That the allegations of paragraph six are denied.

VII

That the respondent states that she has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7.

VIII

That the allegations of paragraph eight are admitted.

IX

That the allegations of paragraph nine are denied.

X

That she, Lillian V. Couch, is, was and always has been the sole and exclusive owner of all books, records, cancelled checks, deposit ticket copies, work papers, bank statements, the right to possession of which is now in question.

XI

That all of said books, records, cancelled checks, deposit ticket copies, work papers, bank statements were created by her own efforts and actions and none of which were ever created by or owned by the said Harold L. Shaffer.

XII

That the delivery of possession to Harold L. Shaffer was temporary only, said Shaffer having been

directed, prior to the time the summons in question was served on him, to return all such books, records, cancelled checks, deposit ticket copies, work papers, and bank statements that he was holding at the will of Lillian V. Couch.

XIII

That the mere fact of temporary possession by said Shaffer created no right, title or interest in said Shaffer for the United States to seize.

XIV

That the mere fact that Special Agent Edward F. Jennings is assigned to the case demonstrated that the Internal Revenue Service is making a criminal investigation of Intervener respondent's affairs relating to income taxes; and

XV

That the mere fact that this show cause action is filed as a civil case does not conceal the criminal nature of this investigation; and

XVI

That the express and sole purpose of the investigation is to obtain evidence concerning any violations of criminal statutes.

XVII

That since Lillian V. Couch is, was, and always has been the sole and exclusive owner and creator of all of the said books, records, cancelled checks, deposit ticket copies, work papers and bank statements, and since this investigation is to determine whether or not Lillian V. Couch has violated any criminal

sections of the Internal Revenue Code, to order the delivery of said records to the United States would abridge her right against self-incrimination guaranteed under the 5th Amendment to the Constitution of the United States and her right guaranteed under the 4th Amendment to said Constitution to have her person and property protected from unreasonable search and seizure.

XVIII

That by reason of all of the above, the intervener respondent has shown cause why Harold L. Shaffer should not be compelled to testify and to produce the records, statements and documents demanded in the Internal Revenue Service summons served upon him on August 18, 1969.

/s/ John G. Rocovich, Jr.
JOHN G. ROCOVICH, JR.
Counsel for
Lillian V. Couch

Claude D. Carter
John G. Rocovich, Jr.
MARTIN HOPKINS AND LEMON
Sixth Floor—Boxley Building
Roanoke, Virginia 24005

I, John G. Rocovich, Jr., Counsel for Lillian V. Couch, do certify that I have on the 19th day of January, 1970, mailed a true copy of the foregoing answer to James G. Welsh, Esquire, Assistant United States Attorney, counsel for Petitioner, Federal Building, Roanoke, Virginia.

/s/ John G. Rocovich, Jr.
JOHN G. ROCOVICH, JR.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

[Clerk's Office U. S. Dist. Court at Roanoke, Va.,
Filed Feb. 27, 1970, Virginia M. Ayers, Clerk,
By Carolyn Brammer, Deputy]

UNITED STATES OF AMERICA and EDWARD F. JENNINGS, Special Agent, Internal Revenue Service, PETITIONERS

v.

HAROLD L. SHAFFER, RESPONDENT

v.

LILLIAN V. COUCH, INTERVENOR

ORDER

The above entitled case having come on to be heard on February 2, 1970, and counsel for the Government states that there was no objection on its part to the dismissal of Harold L. Shaffer, Respondent, provided the Government can get the records of Lillian V. Couch and also the testimony of Shaffer, and it appearing to the Court that the books, records and documents described in the summons issued on August 18, 1969, to the respondent, Harold L. Shaffer, by the petitioner, Edward F. Jennings, are now in the possession of John G. Rocovich, Jr., Esquire, and it further appearing that the petitioners are entitled to inspect such books, records and documents,

It is therefore, ADJUDGED, ORDERED and DECREED that the respondent, Harold L. Shaffer, should be

and he hereby is, dismissed from this proceeding, it is further ORDERED that the motion to intervene Lillian V. Couch be granted; and it is further ORDERED that John G. Rocovich, Jr., Esquire, appear before the petitioner, Edward F. Jennings, at the United States Attorneys office, U. S. Post Office Building, Roanoke, Virginia, at a time and place to be agreed upon mutually for the purpose of producing for examination and/or copy by photostating copy or other mechanical means of reproduction, the following books, records and documents of Lillian V. Couch for the years 1964 through and including 1968:

> All books, records, bank statements, cancelled checks, deposit tickets, copies, work papers, and all other documents pertaining to the tax liability of the above taxpayer.

In the event the petitioner, Edward F. Jennings, and John G. Rocovich, Jr., cannot mutually agree on a time and place, then John G. Rocovich, Jr., is ordered to appear at a time and place designated by the petitioner, Edward F. Jennings; notice of said time and place will be given to John G. Rocovich, Jr., by the petitioner by means of a certified letter mailed to John G. Rocovich, Jr., at his last known address at least ten (10) days prior to the date set by the petitioner.

It is further ORDERED that the respondent, Harold L. Shaffer, shall appear before the petitioner, Edward F. Jennings, at a time and place to be agreed upon mutually for the purpose of giving testimony concerning the correctness of the income tax returns of Lillian V. Couch for the years 1964 through and including 1968.

Upon the oral request of John G. Rocovich, Jr., Esquire, and with consent of counsel for the pe-

titioners, a stay of execution of this order is granted for a period of thirty (30) days from the date of entry of same to permit John G. Rocovich, Jr., Esquire the opportunity to file an appeal from this final order.

The clerk is directed to send copies of this order and copy of findings of fact and conclusions of law to counsel of record.

ENTER:

/s/ Ted Dalton
U. S. Chief District Judge

February 25, 1970

A TRUE COPY, TESTE:

VIRGINIA M. AYERS, Clerk

By: CAROLYN BRAMMER
Deputy Clerk

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